NO. 34701

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below - Respondent,

VS.

CIRCUIT COURT OF JACKSON COUNTY
CASE # 07-F-35

CHARLES M. BIEHL,
Defendant Below - Appellant

BRIEF OF APPELLANT

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PETITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

On January 18, 2007, a preliminary hearing was held before Jackson County Magistrate Reynolds. The case was bound over to Jackson County Circuit court.

On March 1, 2007, a hearing was held on the Defendant's pre-indictment motions. The Court denied the motion to set bon. The Court granted the motion for a Competency and Criminal Responsibility Evaluation. The order for the evaluation was entered on Mach 6, 2007.

On June 28, 2007, the Defendant was brought before the Court for return of indictment. Defense counsel was re-appointed. The case was continued to July 5, 2007 for arraignment or pre-plea motions.

On July 5, 2007, an arraignment hearing was held. The Defendant announced that there were no pre-plea motions and the Defendant entered his plea of "not guilty." The Defendant moved for discovery, which was provided, and the motion was granted. The State filed a motion for disclosure. The Defendant asked for a trial in the same term of court. A trial date of October 2, 2007 was set. A pre-trial conference/suppression hearing was set on August 31, 2007.

By Order filed on August 31, 2007, the pre-trial conference/suppression hearing was re-scheduled for September 21, 2007.

On September 21, 2007, a suppression hearing began. Counsel for the Defendant moved to include other evidence into the suppression motion. The Court granted this

motion. The State began presenting evidence on the search warrants. Due to the absence of an officer, the State moved to continue the suppression hearing. The Court granted the motion and continued the suppression hearing to October 4, 2007.

On October 4, 2007, the suppression hearing was commenced. After hearing evidence, the Court upheld the three search warrants. The Court found that the statements given by the Defendant were taken when the Defendant was not in custody ad was free to leave. The Court also found that the statements were given voluntarily without threat or force. The trial was set for November 6, 2007.

On November 2, 2007, the Court granted the Defendant's motion to continue the trial and the trial was re-set for January 15, 2008.

On January 15, 2008 the Defendant appeared for trial. The Defendant made a motion for change of venue due to prejudicial pre-trial publicity. A jury was chosen and the Court denied the Motion for Change of Venue. The trial was recessed and continued to January 16, 2008.

On January 16, 2008, the parties presented opening statements and the State began its case-in-chief. The case was continued to January 17, 2008 to resume trial.

On January 17, 2008, the State continued with its case-in-chief. The case was continued to January 18, 2008 to resume the trial.

On January 18, 2008, the State concluded it's case-in-chief. Outside the presence of the jury the Defendant moved for a judgment of acquittal. The Court denied the motion. The Defendant then announced that the Defendant would not testify. The Court advised the Defendant of his right to testify. Back in the presence of the jury, the Defendant rested his case. The Court charged the jury. The parties presented closing

arguments. The jury was sent into the jury room to deliberate. Sometime thereafter, the jury returned to courtroom. The jury found the Defendant guilty of Murder in the First Degree. The Defendant asked that the jury be polled and that occurred. The Defendant made a motion for judgment notwithstanding the verdict, which was denied. The case was continued to February 7, 2008 for sentencing.

On February 7, 2008, the Defendant was present for sentencing. The Defendant argued a Motion for Judgment of Acquittal and a New Trial. This motion was denied. After hearing from the State, the family of the victim and the Defendant, the Court sentenced the Defendant to life in prison without the opportunity for parole.

The Defendant filed a Notice of Intent to Appeal on February 8, 2008. The sentencing order was filed on February 20, 2008. This appeal is filed pursuant to that order.

STATEMENT OF FACTS

The following information was taken from the trial transcripts of witnesses called by the State at trial. In the early morning hours of January 8, 2007, Bo Hughes, Larry Good and Jason Watkins discovered the body of their relative, Sharon Farren, in her house on North Street in Ripley, WV. Bo Hughes called 911 to report the crime. The police responded shortly and found the victim kneeling with her face on the floor near the couch in a pool of blood. A telephone cord was found around her neck. Jason Watkins told the officers that Farren's boyfriend "Mike" was gone. "Mike" was described as a white male with dark shoulder-length hair and that he also was wearing a goatee. Mike was reported to have been staying with Farren at her house for a short period of time. The victim with the telephone cord still attached was sent to the West Virginia State Medical Examiner's Office for autopsy while the police searched for "Mike."

The police obtained a search warrant for Farren's residence. They also reviewed surveillance tapes from a local gas station on Route 33 for the prior evening. The officers took evidence at the scene. They found telephone numbers and a notation of "Mike's Mom." Reverse lookup on the telephone numbers revealed the name Biehl. Farren's family members reported the victim having arguments with Mike on January 6, 2007.

The medical examiner found that although the victim had signs of blunt force trauma to the face, the cause of death was strangulation. During the police investigation Farren's family gave the names "Marvin Brown" and "Timothy Ward" to the police as acquaintances of both Farren and Mike. The police began looking for Mike Biehl.

On January 10, 2007, Charles Michael Biehl arrived at a homeless shelter in Charleston. Biehl was transported to the Kanawha County Sheriff's office. At the

Kanawha Sheriff's office, the Jackson police officers interviewed Biehl for four hours. Biehl admitted to hitting the victim in the face but did not confess to strangling her. Biehl stated that he hit Farren and then left walking on Route 33 toward Spencer. He also stated that Marvin Brown was at the Farren residence when he left. Biehl stopped the interview by requesting to speak to an attorney. Biehl was immediately placed under arrest, arraigned by a Kanawha County magistrate and placed in the South Central Regional Jail.

A preliminary hearing was held in Jackson County Magistrate Court on January 18, 2007.

DNA analysis was later performed on the telephone cord that was found around the victim's neck. Farren's DNA and the DNA of an unknown third party were found on the telephone cord. Charles Michael Biehl's DNA was not found on the cord.

ASSIGNMENTS OF ERROR

1. **The court erred in not granting a Judgment of Acquittal when all of the circumstantial evidence adduced at trial would not support a "guilty" verdict.**
2. **The Court erred in denying the Defendant's motion to include lesser-included offenses in the instructions and on the verdict form.**
3. **The Court erred in allowing West Virginia Rules of Evidence 404(b) material into the trial without an in camera determination of prejudicial value versus probative value.**

POINTS AND AUTHORITIES RELIED UPON

West Virginia Cases

State v. Thomas, 157 W.Va. 640, 203 S.E. 2d 445 (1974):

State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978),

State v. Neider, 295 S.E. 2d 902 (1982)

State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986).

State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994):

State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)

ARGUMENT AND DISCUSSION OF LAW

1. **The court erred in not granting a Judgment of Acquittal when all of the circumstantial evidence adduced at trial would not support a "guilty" verdict.**

This Court has held that upon appeal and asserting that evidence produced at trial was insufficient, the Defendant has a heavy burden. This however, is not an impossible quest. Syllabus pt. 1, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995) says:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Further, the Court has held that "...a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." Syllabus pt. 3, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

And finally, this Court has held that "To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done. Syllabus pt. 1, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978), overruled on other grounds by State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)

In the Biehl case, the State, in order to prove First Degree Murder, had to prove: (1) The Defendant, Charles M. Biehl, (2) in Jackson County, WV, (3) on a day in January, 2007, (4) did willfully, intentionally, deliberately and premeditatedly, and with malice, (5) did slay, kill and murder Sharon I. Farren. (Record p. 1634).

What proof was offered at trial? The State proved that Charles Biehl lived with the victim for a short period of time. His fingerprint was found on the wall near the telephone. Biehl had been in an argument with the victim earlier and had struck her. The State also tried to prove that telephone calls were made from Biehl to out-of-state relatives. No telephone records were produced as evidence.

Biehl reported that Marvin Brown was at Farren's house when he left in the interview with the police shortly before he was arrested. Biehl also reported that he left and was walking on Route 33 toward Spencer, which was corroborated by the surveillance video at the gas station on Route 33.

The biggest reason to doubt Biehl, as the person who strangled and killed Farren, is the fact that his DNA does not appear on the telephone cord used to strangle the victim. The State tried to show that the telephone cord was washed down at the medical examiner's office. However, Farren's DNA and the DNA of an unidentified third party was present. If the cord had been washed down, there should be no evidence left. Conveniently, the State tried to insinuate that only Biehl's DNA was washed off.

The State made no offer of proof on the elements of: willfulness, intention, deliberation, premeditation or malice, but asked the jury to try to infer

these elements from the act itself. The State failed to prove its case beyond reasonable doubt and offered no proof as to some elements.

2. The Court erred in denying the Defendant's motion to include lesser-included offenses in the instructions and on the verdict form.

During the trial and after the evidence was presented by the State, the Defendant asked the Court to include instructions on: Battery, Unlawful Assault, and Malicious Assault. The Court denied that motion. Regarding inclusion of lesser-included offenses this Court has declared in State v. Neider, 295 S.E. 2d 902 (1982) that:

> The question of whether a defendant is entitled to an instruction on a lesser-included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one that involves a determination by the trial court of whether there is evidence that would tend to prove such lesser-included offense

In Mr. Biehl's case, the two-prong test should have been applied to all of the lesser-included offenses that the Defendant asked to be considered. Battery, Unlawful Assault, and Malicious Assault would have been viable for the jury if the jury took Biehl's statement to the police into account. In Biehl's statement he admitted to striking the victim in the face but denied strangling her.

The Trial Court indicated that the facial injuries were not the cause of death and used that to exclude the Battery, Unlawful Assault, and Malicious Assault offenses from deliberation. [Record p. 1572] Under this theory, the following error occurred.

3. The Court erred in allowing West Virginia Rules of Evidence 404(b) material into the trial without an in camera determination of prejudicial value versus probative value.

The Court indicated that the victim died due to strangulation and would not include Battery, Unlawful Assault, or Malicious Assault to the instructions and verdict form. [Record p. 1572] Then the Defendant striking the victim, in the Court's opinion, would have been a separate prior or collateral act.

This court has held in Syl. pt. 2, State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994):

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

So if the Trial Court is correct and the lesser-included offenses should not have been given then the court should have conducted a 404(b) hearing. This

prior or collateral crime would unduly influence a jury and suggest that one violent act would necessarily lead to another violent act.

This Court has also stated in Syllabus pt. 16 of State v. Thomas, 157 W.Va. 640, 203 S.E. 2d 445 (1974):

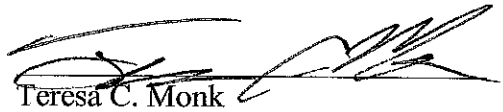
> In the exercise of discretion to admit or exclude evidence of collateral crimes and charges, the overriding considerations for the trial court are to scrupulously protect the accused in his right to a fair trial while adequately preserving the right of the State to prove evidence which is relevant and legally connected with the charge for which the accused is being tried.

From the transcript, it seems as if throughout the trial these collateral acts were treated as part and parcel of the murderous acts until the time came to develop instructions and then the Trial Court tried to make the acts collateral but a 404(b) hearing at that point had not been conducted.

PRAYER FOR RELIEF

Therefore, the Petitioner respectfully prays that this Honorable Court will grant his appeal, reverse the conviction and either dismiss the case or remand the case with instructions for a new trial.

CHARLES M. BIEHL,
By Counsel



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CERTIFICATE OF SERVICE

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